IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 140 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LILABHAI CHHOTABHAI PAGI
.....Appellant
Versus
STATE OF GUJARAT
.....Respondent

Appearance:
1. Criminal Appeal No. 140 of 1992
MR DEEPAK M SHAH for Petitioner
Mr.S.S.Patel, Addl. PUBLIC PROSECUTOR for Respondent

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 10/08/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The appellant-original accused no. 1 challenges the judgment and order dated 3rd February, 1992 of the Additional Sessions Judge, Vadodara in Sessions Case no. 98 of 1990 convicting the appellant-original accused no. 1 for the offence under Sec. 302 of the Indian Penal Code and sentencing him to imprisonment for life.

2. The prosecution case was that on 20th May, 1990 there was a marriage function taking place in village Vadu opposite the house of the complainant Ratilal. It was the function of marriage of the son of Dhura Desai. At noon time, brother of the complainant Ramabhai came there with his wife for attending the marriage ceremony. At that time, Ramabhai chided their nephew Arjun, who was the original accused no. 2, for siding the opposite party in the dispute over the right of way near their house. According to the prosecution, at that time Arjun got excited and started quarrelling with them. Arjun was having an iron pipe and the other two accused i.e. the appellant-accused no. 1 Lila Chhota and the accused no. 3 Kanu who came there were having a crow-bar and a stick respectively. At that time, the appellant-accused no. 1 gave a blow with his crow-bar to Ramabhai on his chest which pierced his heart. Ramabhai, immediately pulled out the crow-bar but died on the spot. All the accused, thereafter, ran away. According to the prosecution, the other accused had also participated in the crime and were guilty of murder along with the appellant-accused no. 1, having shared the common intention to commit the crime.

3. In the charge exh. 2 framed on 16.1.92 against all the three accused persons, it was specifically alleged that the accused no. 1 had given a blow with his crow-bar to Ramabhai with an intention to cause his death and that the accused nos. 2 & 3 had also caused him injuries and shared the common intention of causing his death. All the accused were, therefore, charged with the offence under Sec. 302 read with Sec. 34 of the Indian Penal Code.

4. The defence of the accused was that of complete denial. The trial court, on the basis of the material on record, held that the death of Ramabhai was homicidal and that the accused no. 1 Lilabhai Chhotabhai Pagi had intentionally caused his death by giving him a blow by a crow-bar on his chest which resulted in an injury sufficient in ordinary course of nature to cause his death. As regards the other accused persons, the trial court gave them benefit of doubt by holding that though

their presence was established, their participation in the crime was not proved. The accused no. 1 was, therefore, convicted for the offence under Sec. 302 of the Indian Penal Code and sentenced to life imprisonment and the accused nos. 2 & 3 were acquitted.

5. The learned counsel for the appellant contended that the accused no. 1 could not have been convicted for the offence under Sec. 302 of the Indian Penal Code because the charge was framed against all the accused under Sec. 302 read with Sec. 34 of the Indian Penal Code. He also argued that the eye witnesses were interested witnesses and could not be relied upon. He submitted that since there was a quarrel and possibility of sudden fight, the trial court ought to have examined the case under the provisions of Exception 4 to Sec. 300 of the Indian Penal Code.

6. The learned Additional Public Prosecutor, on the other hand, contended that the guilt of the accused under Sec. 302 of the Indian Penal Code was established beyond any shadow of doubt and he could be convicted for the offence under Sec. 302 of the Indian Penal Code individually because in the charge it was clearly mentioned that the accused no. 1 had given a blow by a crow-bar on the chest of Ramabhai and intentionally caused his death. It was contended that the deposition of the eye witnesses was reliable and there was no reason to discard their testimony. It was also argued that the pant which was recovered from the body of the accused no. 1 at the time when he was arrested, as well as the crow-bar which was found at the place of the incident, were having human blood. He submitted that there was absolutely no reason to upset the decision of the trial court which was based on the material on record.

7. The matter mainly hinges on the deposition of the two eye witnesses. The complainant Ratilal, in his deposition exh. 11, stated that there was a marriage ceremony taking place at his neighbour's house and on that day his brother Ramabhai came with his wife Jashodaben to attend the same at noon time. All the three accused were present there and Ramabhai had questioned them for passing through the path over which they had no right of way. According to him, the accused no. 1 Lilabhai Chhotabhai had consumed liquor and he was having a pointed crow-bar, while the accused no. 3 Kanu was having a pipe and the accused no. 2 Arjun was not having any weapon. The accused no. 1-Lilabhai Chhotabhai, at the instance of Arjun, gave a blow with the crow-bar to Ramabhai, who while trying to take it

out, fell down and died. This witness has identified the crow-bar with which Ramabhai was injured by the accused no.1. In his cross-examination, he has stated that the accused persons had quarrelled with Ramabhai for about half an hour between 12 to 12.30 noon. He denied the suggestion that there was no quarrel. There is nothing brought out in his cross-examination which would create any doubt over his version that the accused no. 1 Lilabhai had given a blow with a crow-bar to Ramabhai, as a result of which Ramabhai died on the spot. The accused had, thereafter, run away as stated by this witness. He is fully corroborated by the earliest version that he gave in the F.I.R. exh. 12.

8. Jashodaben, widow of Ramabhai, in her deposition exh. 10, has categorically stated that along with her husband she had gone to attend the marriage ceremony at the house of Dhurabhai and at that time all the three accused persons quarrelled with them. She also stated that they had beaten them. According to her, Lilabhai Chhotabhai i.e. the accused no. 1 gave a blow on the chest of her husband with a crow-bar and thereafter the accused persons had run away. According to her, the other two accused persons were having sticks. She identified Lilabhai Chhotabhai as the person who had given a blow with the crow-bar to her husband. In her cross-examination, thoroughly irrelevant questions were asked about her having remarried after her husband was dead. In our view, these ought not to have been permitted by the court. She is hardly cross-examined on her assertion that her husband was given a blow by the crow-bar on his chest as a result of which he fell down and died on the spot. We find no hesitation in accepting her version which shows that the accused no. 1 had caused the injury with a crow-bar on the chest of Ramabhai which resulted in his death. As per the evidence of Dr. Ranchhodbhai Gulabbhai at exh. 8, the said injury was sufficient in ordinary course of nature to cause death. He has described the injury in his deposition and has proved the post-mortem report exh. 9 in which the injury on the chest is described as: " 2" x 1" deep penetrating wound over Lt.side of chest 1 cm. away from Lt. nipple". The corresponding internal injuries were: "Lacerated wound at upper border of Lt. lung, and, 1" x 1" deep penetrating wound over Lt. ventricle in the heart," as mentioned in column 20 of the post-mortem report. The cause of death as stated in column 23 was "shock due to severe intruthorucic bleeding due to prenetrating wound over Lt. ventricle." Thus, the medical evidence fully supports the version of both the eye witnesses. We, therefore, find ourselves in full

agreement with the reasoning and findings of the trial court in holding that the accused no. 1 had intentionally caused the death of Ramabhai by giving him a blow by a crow-bar which caused an injury which was sufficient in ordinary course of nature to cause his death.

9. The charge framed against all the accused was under Sec. 302 read with Sec. 34 of the Indian Penal Code but the trial court has convicted only the accused no. 1 for the offence under Sec. 302 of the Indian Penal Code. Though it would have been better if a separate charge was also framed under Sec. 302 of the Indian Penal Code against the accused no. 1 who had caused the fatal injury, the conviction under Sec. 302 of the Indian Penal Code while the charge was under Sec. 302 read with Sec. 34 of the Indian Penal Code is not vitiated, because, in the charge, it was specifically mentioned that the accused no. 1 had intentionally caused the death of Ramabhai by giving him a blow on his chest with a crow-bar. There is therefore no prejudice caused to the accused no. 1 in convicting him for the offence under Sec. 302 of the Indian Penal Code on that ground. As held by the Supreme Court in Hem Raj V/S The State (Delhi Administration) reported in A.I.R. 1990 S.C. 2252, there was no illegality in convicting the appellant under Sec. 302 (simpliciter) though there was a constructive charge against all the accused including the appellant under Sec. 302 read with Sec. 34 of the Indian Penal Code, since the evidence disclosed that it was only the appellant who inflicted the injury which proved fatal. A similar view was taken in para 10 of the judgment of the Supreme Court in Kishore Chand V/S State of Himachal Pradesh reported in AIR 1990 S.C. 2140 in which it was held that the omission to frame an independent charge under Sec. 302 of the Indian Penal Code does not vitiate the conviction and sentence under Sec. 302 of the Indian Penal Code where the accused were charged under Sec. 302 and Sec. 201 read with Sec. 34 of the Indian Penal Code.

10. The question, however, remains whether the case of the accused no. 1 falls within the ambit of Exception 4 to Sec. 300 of the Indian Penal Code which provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner. It is immaterial in such cases which party offers the provocation or commits the first assault. In the present case, even according to the eye

witnesses there was a quarrel which lasted for half an hour between Ramabhai and the accused persons over a dispute in relation to right of way. It appears that there was also a fight. As per the panchanama exh. 19, the accused no. 2 was having an injury on his head at the time when he was arrested under that panchanama. Jashodaben had in her deposition stated that there was a quarrel and the accused had beaten them. Ratilal has also stated that there was a quarrel. It, therefore, appears that there was a sudden fight that took place without there being any premeditated attack, because, the incident took place suddenly when Ramabhai and Jashodaben had gone to attend the marriage where Ramabhai chided his nephew Arjun-the accused no. 2, and thereafter the accused nos. 1 & 3 had come there and the accused no. 1 gave a blow with the crow-bar to Ramabhai. In any event, the possibility of a sudden fight cannot therefore, be ruled out particularly in view of the injury on the head of the accused no. 2. The accused no. 1 had run away after causing the injury to Ramabhai. Therefore, in our opinion, the matter falls within the ambit of Exception 4 to Sec. 300. Looking to the seat of injury and the force with which the blow was given to Ramabhai which caused an internal injury in the heart and lung of Ramabhai as well as the nature of weapon used, in our opinion, the act by which the death was caused was done with the intention of causing death or of causing such bodily injury as was likely to cause death and therefore the offence was covered under Sec. 304 part I of the Indian Penal Code. We, therefore, alter the conviction of the appellant-accused no. 1 from Sec. 302 of the Indian Penal Code to Sec. 304 Part I of the Indian Penal Code and award the following sentence on that basis.

O R D E R

The appeal is partly allowed and the conviction and sentence of the appellant-accused no. 1 Lilabhai Chhotabhai Pagi for the offence under Sec. 302 of the Indian Penal Code is set aside and instead he is convicted for the offence under Sec. 304 Part-I of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a term of ten years and to pay a fine of Rs.500/- in default to undergo further rigorous imprisonment for fifteen days, for the offence under sec. 304 part-I of the Indian Penal Code.

(R.K.ABICHANDANI, J)

(SHARAD D DAVE, J)

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